

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0318
Sales/Use Tax
For the Years 1992-2001**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Tax Administration - Best information available

Authority: Ind. Code § 6-2.5-4-4; Ind. Code § 6-8.1-5-1; Ind. Code § 6-8.1-5-4

Taxpayer protests the imposition of sales tax, with respect to its increased gross receipts and with respect to the rental of booths.

II. Tax Administration - Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2(b).

Taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is an individual who rents booth space to various vendors on holidays and other special occasions. During these times, the vendors also sell food to visitors. Taxpayer either did not file returns or filed returns with all zeroes for the years in question.

The Department audited Taxpayer for the years in question. During those years, Taxpayer did not provide adequate records to the auditor. As a result, Department's auditor based its audit on estimates of number of booths rented and amounts of food sold. Taxpayer protested the audit with respect to the adequacy of the information, timeliness of assessment, and the applicability of sales tax to its rentals of booths.

I. Tax Administration-Best information available

DISCUSSION

With respect to the information the Department used, "the notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed

assessment is made.” Ind. Code § 6-8.1-5-1(b). Under Ind. Code § 6-8.1-5-4, a taxpayer is required to keep records including “all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.”

Here, Taxpayer has submitted handwritten records for the past several years. While these records provide a modicum of effort with respect to record keeping, a third-party record of Taxpayer’s activities—e.g., bank account records showing deposits and withdrawals or some other similar records—would be necessary to verify Taxpayer’s records under these circumstances. This not appearing in the file, Taxpayer’s protest is denied.

Taxpayer also protests whether the booths it rented were subject to sales tax. Ind. Code § 6-2.5-4-4 (a) provides:

A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

- (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
- (2) if the rooms, lodgings, and accommodations are located in a hotel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

Here, Taxpayer argues that its provision of booths did not constitute regularly furnishing those items for consideration. In particular, Taxpayer notes that the booths were rented for only 21 days per year. However, Taxpayer did not conduct this business on an irregular basis or as an extremely infrequent transaction; Taxpayer consistently rented a number of booths for several years, though only around holidays. Taxpayer’s rentals of booths were “regularly furnished” within the meaning of the statute, and accordingly Taxpayer is denied.

FINDING

Taxpayer’s protest is denied.

II. Tax Administration - Penalty

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides in 45 IAC 15-11-2:

- (b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary

reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

A basic duty of care exists for all taxpayers, from individuals of the most modest means to the largest corporations. That duty is one of knowledge of tax laws, knowledge of payment and filing deadlines, and record keeping of one's own business and personal affairs sufficient to retrace their prior financial transactions as necessary for a reasonable period of time. To impute less of a duty is to allow for carelessness or even intentional ignorance to be a defense-something that no effective legal system can permit. If a taxpayer is not certain of the scope of that duty, professional advice and even the occasional question to the Department is available. Taxpayer's actions did not meet the standard necessary to justify penalty waiver.

FINDING

Taxpayer's protest is denied.